International Brotherhood of Electrical Workers, Local Union 16, AFL–CIO (ACCL Enterprises) ***and*** **Darvin Collins.** Case 25–CB–8630

January 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On October 29, 2003, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Brotherhood of Electrical Workers, Local Union 16, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as new paragraph 2(d).

"(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

[1] We affirm the judge's finding that the express contractual language in the Toyota Agreement mandates the conclusion that the parties did not adopt the NECA Agreement's union-security clause. We note that we would reach this conclusion even if the Toyota Agreement did not include a prohibition on using any aspect or obligation of union membership, policies, or requirements to affect referrals. Thus, the fact that the Toyota Agreement neither expressly adopts nor even mentions the NECA Agreement, coupled with conflicts in referral provisions in the Toyota and NECA Agreements and the express language in the Toyota Agreement that "the terms and conditions of this Project Agreement shall supercede and override terms and conditions of any and all other National, area, or local collective-bargaining agreements," demonstrate that the parties to the Toyota Agreement did not adopt the NECA Agreement's contractual provisions, but rather merely agreed to utilize the hiring hall mechanism established by it.

[2] We shall modify the judge's recommended Order to more closely conform to current standard Board language.

Dated, Washington, D.C. January 27, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Belinda Brown, Esq., for the General Counsel.
Charles L. Berger and *Jennifer Ulrich Keppler, Esqs. (Berger & Berger)*, of Evansville, Indiana, for the Respondent.
Darvin Collins, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of an amended complaint and notice of hearing (complaint) issued on August 15, 2003, against International Brotherhood of Electrical Workers, Local Union 16, AFL–CIO (Respondent). The General Counsel alleges, in sum, that in an exclusive hiring hall context Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) in August 2002,[1] by failing and refusing to refer Darvin Collins for employment, and by statements made by its assistant business manager, John Brenner, in connection with that failure and refusal to refer.

Pursuant to notice, I conducted a trial in Evansville, Indiana, on September 4, 2003, at which all parties were afforded full opportunity to be heard. In lieu of presenting any witnesses, the parties stipulated the facts and the relevant documents. Joint Exhibit 1 is the collective-bargaining agreement between Respondent and the Evansville Division, Southern Indiana Chapter, N.E.C.A, Inc. (the NECA Agreement). Joint Exhibit 2 is the collective-bargaining agreement between Toyota Motor Manufacturing, Indiana, Inc. and Koester Contracting Corporation (and other contractors) performing work at Toyota's Gibson County, Indiana plant (the Toyota Agreement).

The General Counsel and Respondent filed posthearing briefings, which I have duly considered.

Issues

1. Did Respondent unlawfully fail and refuse to refer Collins for employment by ACCL Enterprises (the Employer) at the Toyota Gibson County plant (the plant) because he was in arrearage in his union dues payments?

2. Before refusing to refer Collins for such employment, was Respondent obliged to specifically inform him of his dues obligations, including the amount owed, and to afford him a reasonable opportunity to satisfy the obligations?

FINDINGS OF FACT

The parties stipulated the facts, as follows:

[1] All dates hereinafter occurred in 2002 unless otherwise indicated.

1. The filing and service of the charge, as alleged in paragraph 1 of the complaint.

2. The Board's statutory jurisdiction and the status of the Employer as an employer engaged in commerce (par. 2).

3. The status of Respondent as a labor organization (par. 3).

4. The status of Business Manager Larry Scott and Assistant Business Manager John Brenner as Respondent's agents (par. 4).

5. (A) Since at least August 8, the Toyota Agreement has applied to require that Respondent be the exclusive source of referrals of electricians for employment with the Employer at the plant.

(B) On August 19, Respondent failed and refused to refer Darvin Collins to employment with the Employer at the plant beginning August 20.

(C) Respondent engaged in this conduct because Collins was in arrearage in his payment of dues to Respondent.

6. (A) On August 19, Respondent, by Brenner, informed Collins that Respondent would not refer him from its exclusive hiring hall until Collins paid his arrearage in union dues.

(B) Prior to August 19, Respondent failed to provide Collins with a dues statement setting out that he was in arrearage in the amount of $64.70 and that he had a reasonable opportunity to satisfy the arrearage.

7. Respondent runs an exclusive hiring hall.

8. Members cannot seek employment outside the hiring hall.

9. The NECA agreement has at all times applied.

10. The Toyota Agreement has at all times applied.

11. Both agreements require referral through the exclusive hiring hall.

12. On August 19, Collins was eligible for referral to the project as an employee of the Employer on August 20.

13. On August 20, there was employment available by the Employer.

14. Collins could not work without a referral from Respondent.

15. On August 19, Collins knew he was in arrearage in his union dues, was given an opportunity to pay, failed to pay, and was denied a referral because he did not pay.

16. Collins has been a member of Respondent for over 30 years.

17. Collins was Respondent's business manager from 1993 to 1999.

18. In the event that Respondent is found to have violated the Act, the appropriate measure of damages is backpay in the amount of 2 days of pay at the journeyman electrician level.

The Toyota Agreement states at page l, "This Agreement represents the complete understanding of the parties." Article II, section 1 provides in part:

> It is further agreed that the terms and conditions of this Project Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements. It is understood that this is a self-contained, stand alone, Agreement and that by virtue of having become bound to this Project Agreement, neither [Koester nor other contractors] will be obliged to sign any other local, area, or national agreement.

Regarding recognition and employment, article IV provides in part:

> *Section 1.* [Koester and other contractors] recognize the Union as the sole and exclusive bargaining representative for all craft employees working on facilities within the scope of this Agreement.
>
> *Section 2.* The [contractors] agree to recognize and be bound by the legal referral facilities maintained by the union(s) and shall notify the appropriate union . . . when workmen are required.
>
> *Section 3.* Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way, affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect of or obligation of union membership, policies or requirements. There shall be no discrimination against any employee or applicant for employment because of his membership or nonmembership in the union.

Applicable Law

Refusal to refer for arrearage in dues

A union owes its members a duty of fair representation to employees using an exclusive hiring hall. *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989); *Radio-Electronics Officers Union*, 306 NLRB 43, 44 (1992). It may not adversely affect the employment status of someone for discriminatory, arbitrary, or irrelevant reasons. *Miranda Fuel Co.*, 140 NLRB 181, 184–185 (1962). Hiring hall rules may be lawful if the action taken was pursuant to a valid union-security clause or necessary to effective performance of the union's representation function. *Operating Engineers Local 1406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982).

A valid union-security clause can be enforced at the hiring hall level by a refusal to refer an employee whose dues are in arrears, so long as the employee has already worked for the statutory grace period[2] in the bargaining unit to which the clause applies. *Iron Workers Local 118*, 257 NLRB 564, 566 (1981); *Mayfair Coat & Suit Co.*, 140 NLRB 1333 (1963).

Requirement of notice of arrearage

The right of a union to refuse to refer an employee whose dues are in arrears is not unqualified. Thus, in order to seek the discharge of an employee for failing to tender required union dues and fees or, similarly, to not refer the employee for that reason, the union normally must, at a minimum, give the employee reasonable notice of the delinquency. This includes stating the precise amount owed, the months for which dues are owed, and the method used to compute the amount; telling the employee when to make required payments; and explaining that failure to pay the required amount will result in discharge (or nonreferral). *Communications Workers Local 9509 (Pacific Bell)*, 295 NLRB 196 (1989); *I.B.I. Security, Inc.*, 292 NLRB 648, 649 (1988). The purpose of these requirements is to ensure that "a reasonable employee will not fail to meet his obligation through ignorance or inadvertence, but will do so only as a matter of conscious choice." *Valley Cabinet & Mfg.*, 253 NLRB 98, 108 (1980), quoted with approval in *I.B.I. Security*, supra at 649.

Consistent with that purpose, the requirements are not applied mechanically without consideration of the circumstances present in a particular case. Thus, the Board has held that the requirements are not "to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union member," *Auto*

[2] Sec. 8(f) of the Act.

Workers Local 95 (Various Employers), 337 NLRB 237, 240 (2001), citing *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB 117, 125 (1974); *I.B.I. Security*, supra at 649. The Board will excuse a union's failure to fully comply with the requirements when it is shown that the employee willfully sought to evade his union-security obligations. *Auto Workers Local 95*, supra at 240; *I.B.I. Security*, supra at 649.

Analysis and Conclusions

Respondent's failure and refusal to refer Collins

It is not disputed that whereas the NECA Agreement expressly contains a union-security clause, the Toyota Agreement does not.

The language of the Toyota Agreement explicitly states that its provisions "supercede and override the terms and conditions of any and all other national, area, or local collective bargaining agreement" and it is a "self-contained, stand alone, Agreement." Additionally, nowhere in the Toyota Agreement is there any mention whatsoever of the NECA Agreement. Therefore, it cannot be argued that the general terms of the Toyota Agreement incorporate implicitly the union-security clause in the NECA Agreement.

Accordingly, the sole agreement relevant here is the Toyota Agreement, regardless of whether the Employer might otherwise be bound on other jobs to the terms and conditions contained in the NECA Agreement, including its union-security provision.

Turning to the hiring provisions of the Toyota Agreement, it does recognize the various AFL–CIO construction trade unions, including Respondent, and further provides for referrals from union hiring halls. However, it specifically states that referrals shall not be affected by any aspect of or obligation of union membership, policies or requirements. This broad language reasonably encompasses union dues.

For the above reasons, I must reject the argument advanced by Respondent's counsel that the Toyota Agreement "explicitly adopts all of the hiring hall procedures contained in the [NECA] Agreement, including its enforcement mechanism, the union-security clause."[3]

In sum, the express contractual language in the Toyota Agreement mandates a conclusion that electrician jobs at the project were not subject to any union-security provision. I conclude, therefore, that Respondent violated Section 8(b)(1)(A) of the Act by failing and refusing to refer Collins to work at the plant because of his arrearage in union dues, and by Brenner's statement that he would not refer him for that reason.

Failure to Provide Adequate Information to Collins

For purposes of analysis, I will assume here that the job in question was covered by a union-security clause and that Brenner limited his statement to jobs having such a provision.[4]

From the stipulated record, it is not clear whether Collins was aware of his arrearage prior to August 19 or first became aware of it on that date. However, regarding any obligation on Respondent's part to provide him with notice and an opportunity to cure the arrearage before refusing to refer him, it is noteworthy that Collins has been a member of Respondent for over 30 years and, moreover, was Respondent's business manager from 1993 to 1999. Based on his length of membership and his service as an officer for 6 years, I must assume that he was well aware of the need to be current in his dues in order to be referred to jobs covered by union- security provisions.

I therefore cannot conclude that his failure to be current in his dues was the result of ignorance or inadvertence, or that a reasonable person in his position would have been surprised had he been told on August 19 that he would not be referred to jobs covered by union-security provisions, until he became current.

I further note the small amount of the dues arrearage—$64.70. Even assuming that Collins was not aware of the specific amount prior to August 19, this is not a situation involving an arrearage of hundreds or thousands of dollars, in which case immediate payment might have created a significant financial, as well as logistical, burden on him.

Accordingly, I conclude that Respondent did not commit additional violations of Section 8(b)(1)(A) by providing Collins with inadequate information before it did not refer him, or by Brenner's failure to provide him with such information when telling him he would not be referred.

I recommend, therefore, dismissal of the allegations of the complaint relating to the information Respondent provided to Collins about the arrearage.

CONCLUSIONS OF LAW

1. By failing and refusing to refer Darvin Collins to a job covered by a collective-bargaining agreement with no union-security clause, because of his arrearage in union dues, and by telling him that he would not be referred to such a job unless he paid the arrearage, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By such conduct, Respondent violated Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully failed and refused to refer Darvin Collins for employment, it must make him whole for any loss of earnings and other benefits he may have suffered, including 2 days of pay at the journeyman electrician level, as stipulated by the parties. See *Laborers Local 135 (Bechtel Power Corp.)*, 271 NLRB 777, 779 (1984); *Laborers Local 889 (Anthony Ferranto & Sons)*, 251 NLRB 1579 (1980).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, International Brotherhood of Electrical Workers, Local Union 16, AFL–CIO, Evansville, Indiana, its officers, agents, and representatives, shall

1. Cease and desist from

[3] Respondent's motion filed October 14, 2003.

[4] The stipulated record is silent as to when Collins' back dues arose or whether he previously worked at the project, and I decline to make any assumptions. Therefore, the applicability of any statutory or contractual grace period cannot be addressed.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to refer members for employment to jobs covered by collective-bargaining agreements not containing union-security provisions, because the members are in arrears in their union dues payments.

(b) Telling members that they will not be referred to jobs covered by collective-bargaining agreements not containing union-security provisions, until they become current in their union dues payments.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Darvin Collins whole for any loss of earnings and other benefits suffered as a result of not being referred on August 19, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to refer Darvin Collins and, within 3 days thereafter, notify him in writing that it has done so and that it will not use the nonreferral against him in any way.

(c) Within 14 days after service by the Region, post at its office and its hiring hall in Evansville, Indiana, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the hiring hall involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and former members of the Respondent at any time since August 19, 2002.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 29, 2003

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to refer you to jobs covered by collective-bargaining agreements not containing union-security provisions because you owe us dues.

WE WILL NOT tell you that you will not be referred to jobs covered by collective-bargaining agreements not containing union-security provisions until you become current in your dues.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Darvin Collins whole for any loss of earnings and other benefits resulting from our unlawful failure and refusal to refer him to a job covered by a collective-bargaining agreement not containing a union-security provision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure and refusal to refer Collins, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the nonreferral against him in any way.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION 16, AFL–CIO